Supreme Court, U.S.
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No. 98-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

GIANCARLO PARRETTI,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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25 pp

QUESTION PRESENTED

May the fugitive disentitlement doctrine be used to dismiss a moot case?

PARTIES TO THE PROCEEDINGS

Petitioner Giancarlo Parretti was the petitioner in the district court and appellant in the Court of Appeals for the Ninth Circuit. Before the district court, the respondent was Wayne Siefert, Warden of the Metropolitan Detention Center, Los Angeles, California, in his official capacity as custodian of the petitioner. The Court of Appeals for the Ninth Circuit identified the appellee as being the United States of America, and it is the only respondent in this Court.

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The petitioner Giancarlo Parretti respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit *en banc*, entered May 1, 1998 in the above-entitled proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, *en banc*, is reported, *Parretti v. United States*, 143 F.3d 508 (9th Cir. 1998); a copy is Appendix A. The panel opinion of the Court of Appeals for the Ninth Circuit is reported, *United States v. Parretti*, 122 F.3d 758 (9th Cir. 1997), *withdrawn*, 143 F.3d 508 (9th Cir. 1998)(en banc); a copy is Appendix D-21. Prior to the issuance of its opinion, the panel issued an unreported order granting petitioner's motion for emergency review, his petition for relief, and ordering petitioner released. A copy is Appendix E-98. The district court decision that was reversed by the Ninth Circuit panel is unreported.

JURISDICTION

Petitioner was arrested on October 18, 1995 on a warrant of arrest pursuant to 18 U.S.C. § 3184. The warrant purported to authorize petitioner's provisional detention for 40 days to allow the Republic of France time to submit a formal request for extradition. Invoking federal jurisdiction under 28 U.S.C. § 2241, the petitioner filed a petition for a

writ of habeas corpus in the United States District Court for the Central District of California challenging his arrest on Fourth Amendment grounds and his detention without bail for 40 days on Fifth Amendment due process grounds. That court denied the petition.

Petitioner appealed and filed a motion for emergency review under Ninth Circuit Rule 27-3. On November 21, 1995, the Ninth Circuit granted the petitioner's motion for emergency review and issued an order granting his petition and directed his release forthwith from custody. App. E-98. Petitioner was released during the 40 day period of provisional detention. Thereafter, France submitted a formal request for extradition. Petitioner voluntarily appeared to answer the formal extradition request and appeared at his extradition hearing. On May 6, 1997, the Ninth Circuit panel filed an opinion explaining its reasons for granting habeas relief. App. B-1; *Parretti v. United States*, 122 F.3d 758 (9th Cir. 1998).

The Ninth Circuit granted the United States's petition for a rehearing *en banc* on October 2, 1997. App. C-20; *Parretti v. United States*, 124 F.3d 1186 (9th Cir. 1997). The Ninth Circuit's *en banc* decision was filed May 1, 1998. App. A-1; *Parretti v. United States*, 143 F.3d 508 (9th Cir. 1998).

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides:

> No person shall be . . . . deprived of life, liberty, or property, without due process of law; . . . .

The applicable text of 18 U.S.C. § 3184 (prior to its 1996 amendments) is set out in Appendix F-101.

STATEMENT OF THE CASE

1. The Extradition Request and Arrest

The extradition request that initiated this case arose out of a bitter civil dispute between Giancarlo Parretti, an Italian citizen, and the national bank of France, Credit Lyonnais Bank, S.A. ("CLB"), and one of its subsidiaries,

Credit Lyonnais Bank Netherlands, N.V. ("CLBN"). That dispute concerned the $1.3 billion purchase of MGM-United Artists in 1990 by Pathe Communications Corporation, a U.S. corporation that was headed by Parretti, with financing from CLBN. Shortly before the loan was to fund, CLB revised the loan commitments to the disadvantage of Parretti and the newly formed MGM-Pathe.

Afterwards, in 1991, a group of directors appointed by CLBN took over management of MGM-Pathe, brought a civil suit in Delaware state court to oust Parretti and filed criminal charges in France against Parretti. Parretti, in turn, filed a $3.9 billion civil suit against CLB and CLBN in Los Angeles.

In October, 1995, Parretti traveled from his home in Rome to Los Angeles to be deposed in his civil suit against CLB and to answer a criminal charge of perjury in Delaware that had been filed based on his testimony at the civil trial. After Parretti's attorney notified CLB's attorneys that Parretti would appear in Los Angeles to be deposed, the French government, the majority shareholder of CLB, requested the State Department have Parretti arrested in Los Angeles and detained pending a formal request for his extradition to France.

On October 18, 1995, the United States Attorney's Office filed a complaint seeking a warrant for Parretti's arrest under 18 U.S.C. § 3184. The warrant issued on that same day and Federal agents arrested Parretti at the law offices of CLB's attorneys, White & Case, in the middle of Parretti's third day of deposition testimony.

2. The Proceedings Before the District Court and the Ninth Circuit Panel

On the same day he was arrested, Parretti appeared in court and was detained without bail. Parretti argued at his initial appearance before the magistrate judge, and in his habeas petition before the district court, that his arrest was pursuant to an invalid warrant and that he should be discharged completely or released on bail, for three reasons. First, his arrest violated the Fourth Amendment, as the warrant on which it was based was issued without probable cause. App. D-25-26; *Parretti v. United States*, 122 F.3d at 761-62. Second, his detention without bail for 40 days violated Fifth Amendment due process given that he was not a flight risk. App. D-29-31, 70; *Id.*, 122 F.3d at 763-64, 777. Third, special circumstances existed to justify his release on bail. App. D-29-30; *Id.*, 122 F.3d at 763. Parretti's arguments for discharge or bail were rejected, even though the district court found he was not a flight risk. App D-29-30; *Id.*, 122 F.3d at 762-63.

Parretti filed a motion under Ninth Circuit Rule 27-3 seeking emergency review of the denial of his habeas petition. After oral argument before a Ninth Circuit panel, and after spending 35 days in detention, Parretti was ordered released by the Ninth Circuit in an order dated November 21, 1995. The order was based on two independent grounds: first, that his arrest violated the Fourth Amendment because the government had failed to make the required evidentiary showing of probable cause to believe Parretti had committed an extraditable crime; and second, that his detention without

bail violated the Due Process Clause of the Fifth Amendment in light of the district court's finding that he was not a flight risk. App. E-98-99.

The Ninth Circuit panel's November 21, 1995 order was unpublished, but the order stated that "[a]n opinion may follow." App. E-99.

After Parretti was released during the 40 day provisional period, France submitted a formal request for his extradition. The request was filed in the district court by the United States Attorney, acting as counsel for the Republic of France. Parretti voluntarily surrendered to the jurisdiction of the court for purposes of the formal extradition request and was released on bail. He appeared at his extradition hearing in May, 1996. App. D-31, n.6; *Parretti v. United States*, 122 F.3d at 764, n.6. In June 1996, after the magistrate judge issued an order finding Parretti to be extraditable, the United States Attorney stipulated to his continued release on bail while he challenged the extradition order. In January, 1997, just before he was scheduled to be sentenced for his criminal conviction in Delaware state court, Parretti fled the United States and returned to his home in Italy.

On May 6, 1997, the Ninth Circuit panel filed an opinion explaining its reasons for sustaining Parretti's challenge to his arrest and his detention for 40 days without bail. App. D-21, 31-32; *Parretti v. United States*, 122 F.3d 758, 764. The dissent argued that the court had discretion to dismiss the case based on the fugitive disentitlement doctrine, and that it should do so. App. D-96-97; *Id.*, 122 F.3d at 787.

On June 19, 1997, the government filed a petition for rehearing with suggestion for rehearing *en banc*, on the basis that the panel's majority decisions on the Fourth and Fifth Amendment questions should be reconsidered. The Ninth Circuit granted the government's petition. App. C-20.

3. The Ninth Circuit's *En Banc* Proceedings

The government argued that *en banc* review of the merits was appropriate and that the fugitive disentitlement doctrine did not apply to this case. App. A-11-12, n.2, *Parretti v. United States*, 143 F.3d at 512, n.2; App. B-18-19, Appellee's Supplemental Brief, 11/21/97 at 22-25. Parretti agreed. App. A-11-12, n.2, *Parretti v. United States*, 143 F.3d at 512, n.2 (dissenting opinion).

The Ninth Circuit *en banc* unanimously agreed that mootness was not a ground for dismissal. App. A-11-12, n.2; *Parretti v. United States*, 143 F.3d at 512, n.2 (dissenting opinion). Given the inherent difficulty, if not impossibility, of obtaining full review of the legality of a 40 day period of provisional arrest and detention before it expired, the exception to the mootness doctrine for issues that are capable of repetition yet evading review applied. Nevertheless, the *en banc* majority opinion dismissed the appeal by its discretionary exercise of the fugitive disentitlement doctrine, and withdrew the Ninth Circuit's panel opinion. App. A-7; *Parretti v. United States*, 143 F.3d at 511. The majority held that Parretti's fugitive status disentitled him from calling upon the resources of the court to resolve his claims; that the court's decision was not enforceable due to Parretti's fugitive

status; that dismissal of the appeal served an important deterrent function; and that the adversary character of the criminal litigation may be compromised when a defendant is a fugitive. App. A-6-7; *Parretti v. United States*, 143 F.3d at 511.

The Ninth Circuit *en banc* court's dissenting opinion argued that the fugitive disentitlement doctrine was inapplicable based on the factual and procedural circumstances, since: the government, not Parretti, sought the court's relief (from precedent); both parties agreed the doctrine was not applicable; neither party urged the court to invoke the doctrine; Parretti had obtained all the relief that he had sought from the court; and use of the doctrine was inappropriate to frustrate the court's resolution of critical constitutional questions. App. A-11-13; *Parretti v. United States*, 143 F.3d at 512-13 (dissenting opinion).

SUMMARY OF REASONS FOR GRANTING THE WRIT

1. The precedent setting panel opinion held that two important constitutional rights were applicable to the extradition process. The government petitioned for an *en banc* rehearing, and sought to have the *en banc* court clarify the merits of the legal issues, and to have the panel's precedent overturned. The government maintained, as did petitioner, that Parretti's fugitive status from a Delaware state court criminal proceeding should not be used to dismiss this case under the fugitive disentitlement doctrine. Nevertheless,

the Ninth Circuit *en banc* majority, acting contrary to this Court's prior case law, impermissibly expanded its own inherent authority by invoking the fugitive disentitlement doctrine to vacate the panel's opinion and order the appeal dismissed.

The Court should grant a writ of certiorari because the Ninth Circuit's *en banc* ruling invoking the fugitive disentitlement doctrine in these circumstances establishes a new rule of law that conflicts with this Court's prior ruling in *Degen v. United States*, 517 U.S. 820, 829, 116 S. Ct. 1777, 1783 (1996) and other cases. *See Monroe v. Pape*, 365 U.S. 167, 170, 81 S. Ct. 473, 475 (1961). The *en banc* majority's ruling is also at odds with the principles this Court has identified as justifying the fugitive disentitlement doctrine. The doctrine can have no application to a case that is moot, nor can it be used to circumvent an exception to the mootness doctrine that required the court to decide the merits of the difficult constitutional questions posed by the case. The conflict presents a serious problem in establishing the limits of a court's inherent powers, as the Ninth Circuit's *en banc* ruling expands a court's powers considerably beyond limits previously set by this Court. The Court should resolve the conflict, and determine that the *en banc* majority exceeded its authority by its use of the fugitive disentitlement doctrine on these facts.

2. The Ninth Circuit panel's opinion that was vacated by the *en banc* court established that two important constitutional rights are applicable to an individual's arrest and provisional detention pending receipt of a formal

extradition request.

First, the panel held that an arrest pursuant to a foreign extradition request violates the Fourth Amendment unless the government makes an evidentiary showing of probable cause to believe the individual has committed an extraditable crime. Probable cause to believe a foreign arrest warrant exists, the standard urged by the government, is insufficient to satisfy the Fourth Amendment, as are a prosecutor's information and belief allegations about a foreign arrest warrant's allegations. App. D-62-65; *Parretti v. United States*, 122 F.3d at 775-76.

Second, the panel held that an individual's detention without bail pending receipt of a formal request for extradition violates the Due Process Clause of the Fifth Amendment when there is a district court finding that the individual is not a flight risk. App. D-66, n.2; *Parretti v. United States*, 122 F.3d at 781.

The underlying issues that were not reached by the *en banc* court are important constitutional questions that should be decided on their merits. As respondent argued, the government needs to know the legal standard for arrest and detention of an individual pursuant to a foreign arrest warrant. Moreover, these constitutional issues raise questions of foreign policy and treaty obligations which should be clarified by determination of the merits in this case. Further, this case presents a rare opportunity for appellate review of these important questions. App. D-66, n.2; *see Parretti v. United States*, 122 F.3d at 776, n.22. The Court should grant this petition for a writ of certiorari because the underlying

questions are important, and should find that dismissal of the case was inappropriate and that the merits should be decided.

REASONS FOR GRANTING THE WRIT

I.

This Court Should Find That The Fugitive Disentitlement Doctrine Is Inapplicable, Where The Government Sought And Obtained Further Appellate Review To Clarify Legal Issues, After The Case Was Moot As To The Defendant Who Had Fled A Different Proceeding.

The *en banc* majority's ruling invoking the fugitive disentitlement doctrine conflicts with this Court's prior case law, and expands a court's inherent authority to dismiss a case substantially beyond the limits set by this Court. Dismissal based on a party's fugitive status in another case is beyond a court's inherent power. *See Degen v. United States*, 517 U.S. 820, 829, 116 S. Ct. 1777, 1783 (1996) (district court may not strike the filings of a claimant in a civil forfeiture suit for his failing to appear in a related criminal prosecution). Thus, Parretti's flight from a different proceeding in Delaware state court did not provide the Ninth Circuit with authority to dismiss this case in reliance on the fugitive disentitlement doctrine. *See* App. A-11-13; *Parretti v. United States*, 143 F.3d at 512-513 (dissenting opinion). Moreover, the *en banc* majority's reasoning in support of its dismissal is contrary to fact, law and logic.

First, it was the government — not Parretti — that sought relief from the panel's precedent-setting opinion that happened to be published while Parretti was a fugitive. App. A-12; *Parretti v. United States*, 143 F.3d at 513 (dissenting opinion); *see*, App. B-18. Parretti's status as fugitive does not disentitle the government from calling upon the resources of the court to further review the legal issues raised by the panel's resolution of Parretti's claims. *See United States v. Sharpe*, 470 U.S. 654, 681 n.2, 105 S. Ct. 1568, 1573 n.2 (1985). The *en banc* majority is correct that if Parretti had sought resolution of his claims while he was a fugitive from the Ninth Circuit's jurisdiction, the fugitive disentitlement doctrine would be within the court's discretion to apply as a basis for dismissing the case. *See Molinaro v. New Jersey*, 396 U.S. 365, 366, 90 S. Ct. 498, 499 (1970)(per curiam). But the facts here are different.

Second, the *en banc* majority incorrectly relied on the potential for an unenforceable judgment as a basis for invoking the fugitive disentitlement doctrine. *See* App. A-6-7; *Parretti v. United States*, 143 F.3d at 511. Parretti's challenge was directed at the 40 day period of provisional arrest and detention that precedes the submission of a formal request for extradition. As the government acknowledged in its *en banc* pleadings, this case became moot once the 40 day period of provisional arrest and detention had passed, and France submitted a formal request for extradition. App. A-11-12, n.2; *Parretti v. United States*, 143 F.3d at 512, n.2, (dissenting opinion); *see,* App. B-18. Because the case was moot as to Parretti long before he fled the United States, and

long before the *en banc* rehearing, there is no issue as to the enforceability of the judgment against him. Parretti's fugitive status did not make a judgment against him unenforceable; rather, the mootness of the case made further enforcement of the judgment beyond the 40 day period irrelevant. *See*, App. B-18.

Third, the *en banc* majority is wrong that application of the fugitive disentitlement doctrine here is justified or supported by the need deter others from acting similarly, and to promote efficient, dignified appellate practice. *See,* App. A-7; *Parretti v. United States*, 143 F.3d at 511. Dismissal of a moot case will have no effect on a party's likelihood of becoming a fugitive in another case. Since Parretti obtained the relief that he sought from the court before he fled, dismissal of the moot case has little or no deterrent effect on this defendant or others who have no continued interest in the proceeding. Further, the government's petition to the court for further review, to seek clarification of, or relief from, the precedent set by the panel's opinion, specifically advances efficient, dignified appellate practice without regard to the petitioner's fugitive status. *See* App. A-11-12; *Parretti v. United States*, 143 F.3d at 513 (dissenting opinion); *see*, B-18.

As in *Degen*, "disentitlement is too blunt an instrument for advancing" the interests identified by the *en banc* majority, and could "disserve the dignitary purposes for which it is invoked." *Degen v. United States*, 517 U.S. at 828, 116 S. Ct. at 1783. The dignity of a court derives from the respect accorded its judgments, which is eroded by too

free a recourse to rules foreclosing considerations of claims on the merits. *Id.* Those concerns are particularly apt here. The *en banc* court agreed with the parties that the admitted mootness as to Parretti was not a basis for dismissal of the case, because the pre-extradition proceedings arrest and detention events were capable of repetition, yet evading review. App. A-11-12, n.2; *Parretti v. United States*, 143 F.3d at 512, n.2, (dissenting opinion); *see,* B-18; *see also, Murphy v. Hunt*, 455 U.S. 478, 482, 102 S. Ct. 1181, 1183 (1982). The *en banc* majority, however, circumvented that exception to the mootness doctrine which required it to decide the merits, by relying on the fugitive disentitlement doctrine, even though it has no purposeful application to a case that has become moot.

Fourth, the *en banc* majority's generalized worry that the adversary character of criminal litigation may be compromised because Parretti is a fugitive is unsupported by the record. Indeed, as the panel's majority opinion and the *en banc* dissenting opinion note, the record demonstrates otherwise. App. D-66, n.2, *Parretti v. United States*, 122 F.3d at 776-77 n.22; App. A-12-13, n.3, *Parretti v. United States*, 143 F.3d at 513, n.3, (dissenting opinion).

This case presents issues that allow the Court to clarify the limits of inherent judicial authority, and to distinguish the conceptual and practical differences between mootness rules and the fugitive disentitlement doctrine, including the following: (1) whether a court may invoke the fugitive disentitlement doctrine when further appellate review was sought by the government to clarify legal

precedent; (2) whether a court may *sua sponte* invoke the fugitive disentitlement doctrine when the party seeking relief from the court is not a fugitive; (3) whether a court may invoke the fugitive disentitlement doctrine where a party's fugitive status has no relevance to determination of the merits at issue; and (4) whether the fugitive disentitlement doctrine is applicable to a moot case. On the facts of this case, the Court will be able to guide appellate and lower courts with respect to factors that limit a courts' inherent authority and with respect to the range of their authority in cases where a litigant is fugitive from another proceeding.

II.

This Court Should Find That Dismissal Was Inappropriate Because The Important Underlying Constitutional Questions In This Case Should Be Determined On The Merits.

The withdrawn Ninth Circuit panel opinion established two important and previously unaddressed constitutional principals relating to an individual's arrest and provisional detention to await the submission of a formal request for extradition.

First, the panel held that an arrest pursuant to a foreign extradition request violates the Fourth Amendment unless the government makes an evidentiary showing of probable cause to believe the individual has committed an extraditable crime. App. D-62-65; *Parretti v. United States*, 122 F.3d at 775-76.

Second, the panel held that an individual's detention without bail prior to an extradition hearing violates the Due Process Clause of the Fifth Amendment when the district court has found that the individual is not a flight risk. App. D-80; *Parretti v. United States*, 122 F.3d at 781.

Both issues are "extremely important," and the government's positions on the issues are "remarkable and should be examined with the greatest of care." App. A-8; *Parretti v. United States*, 143 F.3d at 511 (dissenting opinion). First, the government contends that on the mere suggestion by a foreign country that it is considering an extradition request, it can "seize a person off the streets (or from a lawyer's office) and deny him his liberty without first showing probable cause to believe he has engaged in criminal activity." *Id.* Second, the government relies on ambiguous language of *Wright v. Henkel*, 190 U.S. 40 (1903), to assert that an almost irrebuttable presumption against bail exists even before an extradition request has been made, even if the lower court finds the defendant poses no flight risk. App. A-9; *Parretti v. United States*, 143 F.3d at 512 (dissenting opinion). The *en banc* dissent noted that the majority's dismissal and "failing to address the government's argument ... [leaves the Circuit's law on the bail issue] in total disarray." *Id.*

Thus, the underlying issues that were not reached by the *en banc* court are important constitutional questions that should be decided on their merits. As the respondent argued, the government needs to know the legal standard for arrest and detention of an individual pursuant to a foreign arrest

warrant. App. B-18. Moreover, these constitutional issues raise questions of foreign policy and treaty obligations which should be clarified by determination of the merits in this case. Further, the present appellate review of these important questions is a rare opportunity to do so. App. D-66, n.2; *Parretti v. United States*, 122 F.3d at 776 n.22. The Court should grant this petition for a writ of certiorari because the underlying questions are important, and should find that the dismissal of the case inappropriately leaves the merits undecided.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the question raised in this petition.

Respectfully submitted,

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